JD–09–04
Detroit, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COMMUNITY EMERGENCY MEDICAL SERVICES, INC.	Cases 7–CA–45582 7–CA–46012 7–CA–46526
and	7–CA–46540 7–CA–46543 7–CA–46571
INTERNATIONAL ASSOCIATION OF EMTS AND PARAMEDICS, AFFILIATED WITH SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO	

Patricia A. Fedewa and Darlene Haas Awada, Esqs., for the General Counsel.
Paul W. Coughenour, Esq., (Brady, Hathaway, Brady & Bretz, P.C.), Detroit, Michigan, for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan on November 17-21 and December 8-10, 2003. The charges were filed between October 28, 2002 and September 3, 2003. The fourth consolidated complaint was issued on October 28, 2003.

After the hearing closed, the parties settled most of the allegations in the complaint with the exception of paragraph 11(d) which alleges that Respondent, Community Emergency Medical Services, Inc. (CEMS) violated Section 8(a)(3) and (1) on August 8, 2003 by discharging one of its employees, paramedic Patrick Montie.

In this settlement, the Union, the International Association of EMTs and Paramedics, agreed to withdraw and not refile all pending charges filed up to and including December 29, 2003, excluding: any charges previously settled by agreement with the NLRB; that portion of Case 7–CA–45193(1) which was deferred to arbitration by the NLRB;[1] and that portion of Case 7–CA–46543 relating to the discharge of Patrick Montie. The Union also agreed to withdraw and rescind all data and information requests pending as of December 29, 2003.

CEMS agreed to rescind the discipline issued to Shawn Prendegrast on or about February 1, 2003 and April 22, 2003, and remove written evidence of this discipline from its files. Respondent has also agreed to inform Shawn Prendegrast in writing that this has been done. The Union agreed that the employer has the right to enforce its uniform policy in a non-discriminatory manner.

[1] This matter was not before me and involves an allegation that Respondent discharged Vicky Pavloff in violation of Section 8(a)(3) and (1).

Respondent agreed to recognize and bargain with the Union and agreed that the certification year shall be extended for six (6) months from the date of the parties' first bargaining session. The parties have agreed that the first bargaining session will take place no later than January 19, 2004.

CEMS and the Union have agreed to maintain during bargaining the tentative agreements previously reached and agree to the implementation of the following tentative agreements on January 7, 2004:

> Management Rights—tentatively agreed to on January 9, 2003;
> Grievance Procedure and Arbitration—agreed to on December 6, 2002;
> Bulletin Board—tentatively agreed to on or about November 6, 2002.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent CEMS provides emergency and non-emergency medical treatment and transportation services to the public in southeastern Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background

On June 12, 2002, the NLRB certified the Union as the exclusive collective bargaining representative of Respondent's employees in a bargaining unit consisting of all full-time and regular part-time emergency medical technicians (EMTs), emergency medical technician-specialists and paramedics.

On September 6, 2002, the Union hired Dennis Albers, a labor consultant, to represent it in bargaining with Respondent. After Albers took over this responsibility from Matthew Levy, a national representative of the Union, relations between the Union and Respondent became increasingly contentious. On July 25, 2003, Respondent withdrew its recognition of the Union. The General Counsel alleged that Respondent violated Section 8(a)(5) and (1) in doing so. This dispute has been resolved by the parties' aforementioned settlement.

Patrick Montie's discharge

Patrick Montie worked for Respondent as a paramedic from 1997 until August 8, 2003. At the time of his termination he was working out of the Novi, Michigan station. Montie supported the Union and Respondent was aware that he did so. In December 2002, Montie attempted to file a grievance on a union grievance form. Respondent's Human Resources Manager Bea Paige informed Montie in writing that CEMS would not accept a grievance on the union's form and would not allow a union representative to file a grievance on his behalf, GC Exh. 48, Tr. 1368.

In the spring of 2003 Montie posted union literature at one of CEMS' stations. He was ordered to take it down by Supervisor Brian McLaren, and also by Supervisor Jeff Saladin. When Montie refused to take union materials down at McLaren's direction, McLaren removed the material himself (Tr. 1388). Montie posted union literature at the station again after McLaren removed it. I credit Montie's testimony that he posted literature at the station that was unrelated to the Union and that Respondent did not disturb this material.

The incident of August 6, 2003

Ken Slinker, Respondent's Chief Operating Officer, testified that he fired Patrick Montie solely on the basis of his conduct during an ambulance run to a private residence in the early morning hours of August 6, 2003. Thus, I deem irrelevant evidence introduced by Respondent regarding an ambulance run in July 2003 and evidence regarding prior discipline that Respondent issued to Montie.[2]

On a 24-hour shift that ran from 7:00 a.m. August 5, to 7:00 a.m. August 6, 2003, Montie worked in an ambulance with paramedic Richard Dunn. These two paramedics had worked as partners on a regular basis since January 2003 and at least by August, disliked one another.[3] Montie and Dunn responded to a call at about 10 or 11:00 p.m. on August 5. Montie drove the ambulance and Dunn operated as the attending paramedic. After the call or run was over, they went back to where they were parked and waited for their next call. Montie went to sleep while they waited, which is not a violation of any work rule.

At about 2:35 a.m. on August 6, Supervisor Troy Rowe contacted Dunn and dispatched the ambulance to a residence in Novi. Rowe dispatched the ambulance as a #1 priority call, which signifies a medical emergency. Dunn drove to the residence; Montie woke up enroute or when they arrived. Dunn and Montie were joined at the house by two Novi fire trucks. They entered the house with four firefighters at 2:42 a.m. and were at the residence for 21 minutes, leaving at 3:03 a.m. (R. Exh. 18). Dunn and Montie's usual practice, and that of other CEMS employees, was to alternate as to which one attended to the patient. Generally, this was the paramedic who did not drive to the scene. Thus, for the call in question, Montie would normally act as attending paramedic.

When the two paramedics and four firefighters entered the house, they determined that the patient was a female diabetic who called 911 very frequently for non-emergencies. Fireman James Durham took her vital signs, such as her pulse and blood pressure, and then determined that the patient was neither seeking medical treatment nor transportation to a hospital or clinic. She had gone to bed without her insulin and felt too dizzy to get out of bed to get it herself. The patient asked the paramedics and firefighters to get her insulin for her. The paramedics and firemen searched the kitchen for her insulin before finding it. The patient, who never left her bed, administered the insulin by injecting herself with an insulin pen (essentially a prefilled syringe). Richard Dunn entered the bedroom and determined that the patient knew who she was, where she was and was oriented as to time. Dunn then obtained her vital signs and had the patient sign a document refusing medical treatment or transportation.[4]

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[2] Because it is irrelevant, I make no findings of fact with regard to the allegations that Montie was guilty of misconduct during the ambulance run in July.

[3] There is no indication that Montie and Dunn's mutual antipathy had anything to do with the Union. Neither of them signed the decertification petition that was at issue in this case prior to the settlement.

[4] This document is referred to as an "S & R" or sign and release form. It's not entirely clear

Continued

There is a conflicting testimony as to whether Patrick Montie made contact with the patient before Dunn. The paramedic who first makes contact with the patient is the attending paramedic and is responsible for completing the call. Montie testified that he never entered the patient's bedroom. Dunn testified that Montie went into the patient's bedroom before he did. James Durham, one of Respondent's EMTs, also works for the Novi fire department and was one of the firemen present. Durham recalled seeing Dunn in the patient's bedroom, but not Montie.

I find that Montie entered the bedroom and made contact with the patient before Dunn. First of all, consistent with the usual practice of Respondents' employees, Montie would have been the attending paramedic. Secondly, a close reading of Durham's testimony leaves open the possibility that Montie was in the bedroom before Dunn and that Durham merely failed to notice his presence. In any event, Dunn reported to his supervisor that Montie had initiated patient contact and I conclude that CEMS had a reasonable belief that this was so—regardless of which paramedic actually entered the patient's bedroom first.

After the insulin pen had been found and passed to the patient, Montie left the house and went to sleep in his ambulance. Dunn went out to ambulance to get a clipboard to assist with the completion of the paperwork for the run and noticed Montie sleeping. The ambulance left the residence as a priority 3 (out of 4) or nonemergency call, rather than a priority 1 call. When the ambulance returned to its station, Dunn called Supervisor Troy Rowe and complained about Montie's conduct.[5]

Rowe told Dunn to submit a written report about the incident and to have Montie call him. When Montie called, Rowe told him to submit a report within 24 hours. Montie declined to do so. Montie told Rowe that whether or not he was the attending paramedic was inconsequential since Dunn had obtained the appropriate signed releases from the patient. Dunn submitted an incident report to Rowe, which Rowe forwarded to Respondent's Chief Operating Officer Ken Slinker. Rowe had told Slinker about the incident on the telephone on the morning of August 6.

On Friday, August 8, 2003, when Montie reported to work, he was escorted to a conference room to meet with Ken Slinker. Slinker had already prepared Montie's termination notice, but may not have signed it. By Montie's account, Slinker told him Respondent was firing him because he had initiated patient contact and had not obtained a signed release form from the patient. Montie testified that he told Slinker that since CEMS had a signed release it didn't matter who obtained it, Montie or Dunn. Moreover, Montie testified that he denied having any contact with the patient.

Slinker testified that Montie told him that he had talked to the patient but hadn't done anything for her. He testified that because Montie had made contact with the patient he was guilty of "patient abandonment" in leaving the house before a signed release form had been obtained from the patient. Slinker was aware that Dunn had obtained such a release. Prior to

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whether the patient's vital signs were taken once or twice. Similarly, Dunn may have simply recorded vital signs taken by a fireman.

[5] Respondent's witnesses testified that individuals from the Novi Fire Department complained about Montie's conduct. I need not make any finding as to whether such complaints were received.

the end of the meeting, Slinker presented Montie with his termination notice, which stated that "patient abandonment" was the reason for the discharge.

Analysis

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB No. 177 (2002).

The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *American Gardens Management Co.,* 338 NLRB No. 76 (November 22, 2002). Unlawful motivation is most often established by indirect or circumstantial evidence, such as the suspicious timing of disciplinary action, pretextual reasons given for the discipline and disparate treatment of the discriminatee(s) compared with employees without known union sympathies.

In the instant case, the General Counsel has established that Respondent was aware that Patrick Montie supported the Union and had engaged in activities to assist the Union, such as posting union literature in the stations. I infer that Ken Slinker, the management official who fired Montie, was aware through Montie's supervisors and through Human Resources Director Bea Paige, of Montie's support for the Union and his posting of union materials. Given the level of hostility between Respondent and the Union, I infer that lower level supervisors advised Slinker and other high-level management officials of any significant activity in support of the Union by CEMS employees.

There is also evidence of anti-union animus on the part of Respondent and Ken Slinker in particular. The relationship between CEMS and the Union was hostile—particularly after Dennis Albers began to represent the Union in September 2002. When Patrick Montie attempted to file a grievance with Respondent on a union form, it was rejected because it was on a union form. Moreover, Respondent's discriminatory reaction towards union literature posted by Montie, leads me to conclude that CEMS bore animus towards Montie by virtue of his union activities. Finally, Ken Slinker's August 2, 2002 email [a year prior to Montie's discharge] regarding employee Andy Emler indicates that Slinker bore animus to employees who actively supported the Union.

Regarding Emler, Slinker wrote, "[p]erhaps he WAS a good employee but I would respectfully disagree that he is one now. He is the one who ran to the union about having the car moved from Sinai and he is also one of a pair who consistently has bills missing or incomplete documentation. His absence and tardy record is no better than some of our worst employees and he lobby's behind our backs for whatever is good for Andy." (GC Exh. 45).

The General Counsel argues that I should infer that Respondent was motivated by anti-union animus in discharging Patrick Montie on August 8, 2003. I find that there is insufficient evidence to draw such an inference. The General Counsel relies on:

1. the timing of Montie's discharge, which occurred approximately two weeks after Respondent withdrew its recognition of the Union;

2. alleged disparate treatment of Patrick Montie when compared with employees without known union sympathies;

3. an allegedly inadequate investigation of the August 6 incident;

4. shifting reasons advanced for Montie's termination.

5. the implausibility that Respondent would fire Montie for such a minor offense, without a discriminatory motive.

Timing

I conclude that the timing of Montie's discharge in of itself does not establish discriminatory motive. Montie's activities on behalf of the Union occurred several months before his termination. His discharge was certainly not motivated by anti-union animus regarding anything he had done recently. Furthermore, the fact that Respondent withdrew recognition of the Union two weeks prior to Montie's discharge does not significantly bolster the General Counsel's theory of discriminatory motive. Finally, I conclude that there is insufficient other evidence on which to conclude that the timing of the discharge suggests discrimination.

Alleged Disparate Treatment

In contending that Montie was disparately treated, the General Counsel relies primarily on one-day suspensions issued to Tara Pina and Shaina Shevein in April 2002, GC Exh. 38. Pina and Shevein were suspended for failing to obtain an S & R form while on a call at a nursing home. There is virtually no evidence regarding details of this incident in the record, Tr. 578. However, the fact that Pina and Shevein were at an institutional facility and not at a private residence makes their situation distinguishable from Montie's. The patient would not have been completely alone when they left the scene. I find that this incident does not support the General Counsel's contention that Respondent fired Patrick Montie for discriminatory reasons.[6]

There is no credible evidence that other employees, for whom there is no evidence of union support, were treated more leniently. Patrick Montie made some charges alleging serious on-the-job misconduct by Richard Dunn. I find that Respondent was unaware of these allegations until approximately August 21, 2003, two weeks after Montie was discharged. I draw no inferences from Respondent's failure to investigate these allegations—which were not reported by any other source. The General Counsel also alleges disparate treatment on the grounds that CEMS did not confront Dunn about violating the Southeastern Michigan Protocol in not recording the patient's blood sugar on the run form on August 6. It has not been established that Dunn violated this Protocol.[7] Dunn testified without contradiction that he could not have taken the patient's blood sugar without her consent. It has not been established that he was obliged to ask the patient to take her own blood sugar reading and then record it.

[6] I simply do not understand how the treatment of Lavon West, whom Respondent fired, supports the General Counsel's theory of this case.

[7] First of all, the General Counsel has not established that the provisions of the Protocol, Exh. G.C. 47, page 407, relating to diabetic emergencies, applied to the August 6 run. There was no testimony adduced at hearing on this subject.

Allegedly Inadequate Investigation

The General Counsel contends that Respondent's discriminatory motive is indicated by its failure to do a more thorough investigation of the August 6 incident, for example, by interviewing the four firefighters who were at the residence. However, CEMS provided Patrick Montie an opportunity to provide his version of events. Supervisor Troy Rowe discussed the incident with Montie on the morning of August 6, and gave him an opportunity to present Respondent with a written response to the allegations made against him. Montie simply declined to make the report Rowe requested. Since Montie declined to do so, I do not infer discriminatory motive from the fact that CEMS did not try to interview the fire department personnel who were also at the residence during the run in question, or the fire chief who allegedly complained about him. Indeed, there is no evidence that Montie suggested to Rowe or Slinker that they talk to the fire department personnel to confirm his version of events.

Even more importantly, Respondent relied primarily on Dunn's complaints about Montie in terminating Montie. The argument that Montie made to Rowe and Slinker emphasized his belief that his conduct did not constitute significant misconduct. Indeed, he told both of them that it didn't matter whether he or Dunn was the attending paramedic. Thus, it was not that significant that Respondent didn't try harder to resolve any discrepancies in the accounts of Dunn and Montie. Moreover, it is more likely than not that Montie never claimed that Dunn was the attending paramedic. He told Rowe and Slinker that since CEMS had an S & R form from the patient, the fact that he went out to the ambulance and went to sleep while Dunn completed the run did not constitute significant misconduct.

Shifting Reasons

The General Counsel's argument regarding shifting reasons relies on Patrick Montie's disputed testimony. Ken Slinker testified that he fired Montie solely on the basis of the August 6 incident (Tr. 1049)[8] and that he told Montie at the outset of the August 8 meeting that the issue was patient abandonment (Tr. 1032). I therefore, decline to infer discriminatory motive on the basis on allegedly shifting reasons for the discharge.

Implausibility

Finally, I decline to infer discriminatory motive on the grounds that it is implausible that CEMS would have fired Montie for his behavior on August 6, without a discriminatory motive. There are factors indicating that Montie's misconduct, if any, was not that significant. For example, he left the patient's residence only after he and others determined that the patient did not need any medical treatment or transportation. Moreover, the only tasks performed by Richard Dunn after Montie went out to the ambulance were taking the patient's vital signs, possibly for a second time, and obtaining a signed release.

On the other hand, James Durham, the General Counsel's witness, testified that when a paramedic or EMT initiates patient care, he or she must treat the patient, transport the patient, or get a signed refusal of treatment and transport. His testimony also supports Respondent's position that if the attending paramedic or EMT does not do one of these three things, he or she is guilty of patient abandonment. Respondent had a reasonable belief that Patrick Montie

[8] Respondent's counsel raised other issues and implied that they were relevant to the discharge. I do not infer discriminatory motive simply because counsel and his witness were not in sync with one another.

initiated patient contact and that he was the attending paramedic during the ambulance run in question—regardless of whether this was in fact the case. Thus, I cannot conclude that Respondent's belief that Montie was guilty of patient abandonment was unreasonable.

Additionally, the fact that Dunn obtained a signed release from the patient does not lead me to the conclusion that the incident was so trivial that CEMS could not have discharged Montie without having a discriminatory motive. When Montie left the residence, he had no way of knowing whether Dunn would obtain the signed release or not. Respondent had a reasonable belief that Montie placed Dunn in a position where he had to assume Montie's responsibility to obtain the signed release.

For the reasons stated herein, I find that the General Counsel has failed to make a *prima facie* case that Patrick Montie's discharge was motivated by Respondent's anti-union animus. Thus, the General Counsel failed to establish that Respondent violated Section 8(a)(3) and (1) of the Act in terminating Patrick Montie. For that reason I dismiss paragraph 11(d) of the Complaint, Case No. 7–CA–46543.

Dated, Washington, D.C., February 10, 2004.

Arthur J. Amchan
Administrative Law Judge